U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 25 July 2007

CASE NO.: 2006-LHC-01302

OWCP NO.: 40-117636

In the Matter of:

J. N.,
Claimant,

vs.

WMATA / HAYWARD BAKER,
BROADSPIRE CLAIM SERVICES, INC.,
Employer and Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

On April 9, 2007, I issued a Decision and Order Approving Settlement Agreement which approved a settlement agreement entered into by the parties in this proceeding. This Decision and Order was served on the parties by the District Director on April 19, 2007. On May 3, 2007, the District Director filed a Motion for Reconsideration asking that I vacate my Decision and Order and remand this matter to the District Director to take action on the settlement agreement.

For the reasons set forth below, the Motion for Reconsideration is DENIED.

BACKGROUND

On July 12, 1977, the Claimant injured his right knee in the District of Columbia ("D.C.") while constructing Metro subway transit tunnels for the WMATA (Washington Metropolitan Area Transit Authority) / Hayward Baker ("Employer"). (Defendants' Opposition to Director's Motion for Reconsideration, Exhibit ("EX") 1.) On December 28, 1983, the Claimant was awarded compensation based on a scheduled 50% permanent partial disability. (EX 1.)

In February 1993, the Employer stopped paying the Claimant's medical expenses and controverted liability for the Claimant's medical treatment of various non-industrial conditions. (EX 1.) On October 24, 1997, the presiding administrative law judge ("ALJ") approved a settlement between the parties that resolved the disputed medical benefits that the Claimant incurred in the period between the Employer's controversion of liability and the date of the settlement agreement. (EX 1.)

On September 25, 2006, the Employer again controverted the Claimant's ongoing medical treatment, alleging that his medical care was not casually related to his original work injury in July 12, 1977. (EX 1.) On April 9, 2007, I approved a settlement agreement between the parties, which provided for the payment of a lump sum to settle the Employer's liability for future medical benefits arising out of the industrial injury. (EX 1.) The settlement also provided that the Employer would pay, adjust, or litigate other disputed and outstanding medical bills. (EX 1.)

On May 3, 2007, the Director submitted Director's Motion for Reconsideration, contending that under binding D.C. Circuit Court case law, an ALJ does not have the authority to approve settlement agreements for medical benefits. On May 18, 2007, the Employer submitted Defendants' Opposition to Director's Motion for Reconsideration, asserting that the case falls under the jurisdiction of the Ninth Circuit, and therefore, D.C. precedent is not binding. The Employer further argued that the Director was prohibited from challenging the settlement under the legal doctrines of estoppel and waiver. On June 6, 2007, the Director submitted Director's Reply to Defendants' Opposition to Motion for Reconsideration, refuting the Employer's contentions. On June 22, 2007, in lieu of a response, the Claimant submitted a Declaration of the Claimant in Support of Motion to Expedite.

APPLICABLE LAW

I. The 1928 D.C. Act

This claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*. (2006) ("Longshore Act"), as extended by the District of Columbia Workmen's Compensation Act of 1928, 45 Stat. 600, most recently codified at 36 D.C. Code §§ 501-02 (1979) ("D.C. Act"). Under the original version of the Longshore Act applicable through the D.C. Act, Congress assigned the Secretary of Labor ("Secretary") the exclusive authority to review and approve settlement agreements that discharge liability for medical benefits. 33 U.S.C. § 908(i)(B) (1972). The Secretary subsequently delegated its settlement authority to the Director of the Office of Workers' Compensation Programs ("OWCP"). 20 C.F.R. §§ 701.201-701.203 (2005).

II. Repeal of the D.C. Act in 1982

The D.C. Act was repealed, effective July 24, 1982. 27 D.C. Reg. 2503, 2541. However, under the general savings statute, 1 U.S.C. § 109 (2007), the D.C. Act continued to be in effect for workers who were exposed to injurious work conditions before the repeal of the D.C. Act. *Id*.

III. 1984 Amendments

In 1984, Congress amended the Longshore Act and altered the language regarding settlement approval, vesting ALJs with the authority to approve settlements that included terms resolving future medical benefits. Pub. L. No. 98-426, 98 Stat. 1639 (codified as amended in 33 U.S.C. §§ 901, *et seq*.); 33 U.S.C. § 908(i)(1). The U.S. Department of Labor ("Department") subsequently enacted regulations applicable to claims filed under the D.C. Act "for injuries or deaths based on employment events that occurred prior to July 26, 1982." 20 C.F.R. § 701.101 (2007). Before the regulations were published in the Code of Federal Regulations, the Department preliminarily released the regulations as "final rules," along with an explanatory "preamble to the final rules," which explained the reasoning behind the regulations. 51 Fed. Reg. 4270 (Feb. 3, 1986). The final rules were eventually codified in 20 C.F.R. § 701.101, *et seq*.

At issue is whether an ALJ has authority to approve a settlement agreement resolving medical benefits, which depends on whether the 1984 Amendments are applicable to the D.C. Act, repealed in 1982.

DISCUSSION

I. Under D.C. Circuit Case Law, the 1984 Amendments Have No Effect on the D.C. Act

Under the Longshore Act, jurisdiction for judicial review is determined by the location the employee sustained his or her work injury. 33 U.S.C. § 921(c) ("Any person adversely affected or aggrieved by a final order . . . may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred."). The Claimant was injured in D.C., therefore, the law of the D.C. Circuit is controlling, and not the law of the Ninth Circuit, as the Employer contends.

The D.C. Circuit has ruled on the applicability of the 1984 Amendments to the D.C. Act on various occasions. In *O'Connell v. Maryland Steel Erectors, Inc*., 495 A.2d 1134 (App. D.C. 1985), the D.C. Circuit held that because the D.C. Act was repealed in 1982, it "ceased to exist by 1984, when Congress amended the Longshore Act." *Id*. at 1142. Accordingly, because the D.C. Act "was no longer on the books, what Congress subsequently did to the Longshore statute did not affect any rights created by such prior law." *Id*. at 1142. The D.C. Act was repealed in 1982, and therefore, it did not incorporate the language of the 1984 Amendments. *Id*.

In *Kenner v. WMATA*, the D.C. Court of Appeals reiterated its conclusion from *O'Connell*, maintaining that the repeal of the D.C. Act in 1982 severed the application of the Longshore Act to D.C. area workers' compensation claims, such that the subsequent 1984 Amendments had no "effect on the law of the District." 800 F.2d 1173, 1175 (D.C. Cir. 1986). The court stated that while the general savings statute keeps "the 1928 [D.C.] Act alive, it does so for the sole purpose of preserving the provisions of the Longshoremen's Act, *as they existed in 1982*, for the benefit of employees whose claims are derived from injuries occurring before the 1982 Act became law." *Id*. at 1175 (emphasis original). The court found it "irrelevant" that the Department espoused a contrary view in the preamble to the final rule. *Id*. at 1179. In

discounting the Department's stance, the court reasoned that the issue was "not a question of interpreting *how* the 1984 amendments are to be applied to claims for injuries incurred prior to the 1928 [D.C.] Act's repeal, but of determining *whether* they have any application to those claims whatever." *Id*. The court maintained that although "the former question would enlist the Department's expertise with respect to a matter within its statutory responsibility, the later involves a pure question of law whose interpretation lies within the exclusive province of the courts."[1] *Id*.

In addition to these D.C. Circuit opinions, in *Robidoux v. Xerox Corporation*, ALJ Stephen Purcell vacated his previous order approving a settlement agreement for future medical benefits in a D.C. Act case, based on the D.C. Circuit opinion in *Keener*. USDOL/ALJ Reporter (PDF), ALJ No. 2005-DCW-00001 (ALJ August 9, 2005).

II. The Preamble to the Final Rule Contrarily Indicates that the 1984 Amendments Apply to the D.C. Act

In the preamble to the final rules, published in the Federal Register on February 3, 1986, the Department elaborated on its intent behind the regulations enacted as 20 C.F.R. § 701.101, *et seq*. in the Code of Federal Regulations. 51 Fed. Reg. 4270 (Feb. 3, 1986). In the preamble, the Department apprised "concerned parties and tribunals" of "the Department's construction of the interrelationship between the 1928 [D.C.] Act . . . and the 1984 Amendments." *Id*. at 4270. Although the preamble was not published in the Code of Federal Regulations, the official governmental publication of agency regulations, the preamble was subjected to formal, administrative "notice and comment"[2] rulemaking procedures and published in the Federal Register. In the preamble, the Department confirmed that the D.C. Act "is to be treated as still in effect, for all purposes (including application of the current version of the [Longshore Act] according to its terms), in cases in which the employment event or events on which the claim is predicated occurred before the new D.C. Act took effect." *Id*. The Department further asserted:

> The 'general savings statute,' 1 U.S.C. [§] 109, not only preserves 'liabilit[ies] incurred' under a repealed statute, but further provides that for purposes of determining and enforcing such liabilities[,] the repealed statutes 'shall be treated as still remaining in force.' Hence, as to the preserved claims and liabilities, the 1928 [D.C.] Act is 'still . . . in force.' The terms of the statute that is [*sic*] thus preserved for the relevant class of rights and liabilities (the 1928 [D.C.] Act)

[1] This distinctions of "how" or "whether" a statute applies and whether the issue presented is a "pure question of law" have not been made by the Supreme Court in determining an agency's authority to interpret and elaborate upon statutory provisions. In fact, in the Supreme Court's most recent administrative law case, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (Sup. Ct. June 11, 2007), available at: <http://www.supremecourtus.gov/opinions/06pdf/06-593.pdf> (last visited Monday, July 9, 2007), the Court deferred to the Department's determination of "whether" a category of workers fell within the statute's coverage, or were exempted class, thus expressly contradicting the language in *Keener*. *Id*. In fact, the court in *Keener* cites no case law in support of its assertion. *Id*. Given this recent case law, the reasoning in *Keener* that discounts the Department's view in the preamble appears to be unsound and unsubstantiated by administrative law.

[2] "Notice and comment" procedures are a formal rulemaking process where an agency provides public notice of prospective regulations and opens them up for public comment. 5 U.S.C. § 553 (2007). After the agency allows the public to participate in the rulemaking process, the agency will issue final regulations and a general statement of their basis and purpose. *Id*.

> expressly make the [Longshore Act] *as amended* applicable; and the [Longshore Act] as currently amended, includes provisions added in 1984 which are expressly applicable to claims arising out of employment before 1982 as much as to those arising after 1984."

Id. at 4271 (emphasis original). Therefore, contrary to the D.C. Circuit, the Department concluded that the D.C. Act was directly affected by the 1984 Amendments. The preamble discredited two D.C. Circuit opinions that held otherwise: *O'Connell v. Maryland Steel Erectors, Inc*., 495 A.2d 1134 (App. D.C. 1985) and *In re Metro Subway Accident Referral*, 630 F. Supp. 385 (D.D.C. 1984).

First, the Department asserted that D.C. Circuit's reasoning in *O'Connell* that the D.C. Act "'ceased to exist' and 'was no longer on the books' in 1984" was erroneous and inconsistent with the courts' application of the D.C. Act, pre- and post- 1984 Amendment. 51 Fed. Reg. at 4270 (quoting *O'Connell*, 495 A.2d at 1142). The Department maintained that the D.C. Act continues to exist, and "[p]ursuant to the general saving statute, the 1928 [D.C.] Act *remains in force* for all circumstances in which the employer's liabilities were 'incurred' before its repeal, even if those liabilities had not yet accrued." *Id*. at 4272 (emphasis original). The Department noted that the *O'Connell* court "erred in reasoning that Congress and the President intended the 1984 Amendments to apply only to maritime, not 'purely land based,' employment; even apart from the old [D.C. Act], the Amendments certainly apply to entirely non-maritime employment through the other statutory extensions of the [Longshore Act]." *Id*.

Second, the Department asserted that the rationale in another D.C. case, *Metro Subway*, was similarly untenable and questioned its reasoning "that the [general] saving statute preserves only '*accrued* rights and liabilities' 'existing at the time of the repeal[.]'" *Id*. (quoting *Metro Subway*, 630 F. Supp. at 390). The Department emphasized that the reasoning was faulty because if only "'accrued' liabilities and rights were preserved for enforcement after that date, there would be no basis for the *continuing* accrual of rights and liabilities under the [D.C.] Act after its repeal, even in circumstances where the *employment events* on which the rights and liabilities are based occurred before then." *Id*. (emphasis original). The Department concluded that "[s]ince the rights and liabilities preserved by the general saving statute included liabilities that were not 'accrued' or 'vested,' but were *contingent* (even though already 'incurred'), the application of new legislation readjusting some of those liabilities upwards and others downwards is entirely valid." *Id*.

In addition to speaking to the logic behind the applicability of the 1984 Amendments to the D.C. Act, the Department also stressed that Congress *intended* for the D.C. Act to "remain fully in effect with respect to past *and future* liabilities deriving from pre-1982 employment events." *Id*. (emphasis original). Furthermore, it maintained, "when Congress passed the 1984 LHWCA Amendments, it intended to readjust and rebalance the rights and liabilities in *all* cases in which the [Longshore Act] was the measure of those rights and liabilities." *Id*.

III. The Preamble Is Authoritative

Although the parties did not analyze the effect of administrative deference here, it is imperative to resolving the palpable conflict between the preamble and the D.C. case law, and therefore I address it *sua sponte*.

A. Chevron Deference

Courts accord varying degrees of deference to administrative agencies. Where Congress has entrusted an administrative agency with policymaking authority by: 1) expressly delegating to the agency the authority to elucidate upon statutory provisions, or by 2) drafting a statute ambiguously or leaving interpretative gaps so that the agency may fill in the holes, then courts must defer to the agency's ensuing regulations. *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696 (1991). However, courts do not have to defer when the regulations are "procedurally defective, arbitrary or capricious in substance or manifestly contrary to the statute." *U.S. v. Mead Corp*., 533 U.S. 218, 226-27 (2000). This standard of deference is titled "Chevron deference"[3] and is based upon the Administrative Procedure Act, which commands courts reviewing agency conduct to "hold unlawful and set aside" agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 551. Chevron deference is generally limited to regulations enacted through formal administrative procedures that tend "to foster the fairness and deliberation that should underlie a pronouncement of such force." *Mead*, 533 U.S. at 230.

Regulations warranting Chevron deference need only be "reasonable" to be treated with the same force and effect as Congressional law. *Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998) (recognizing where a statutory term is ambiguous, courts need not decide whether the regulation is "the best interpretation of the statute, but whether it" is a reasonable one); *Mourning v. Family Publications Service, Inc*., 411 U.S. 356, 369 (1973) (noting that a regulation promulgated pursuant to a grant of authority is valid if reasonably related to the purposes of enabling legislation). Chevron deference reflects the proper roles between the executive and judicial branches, and the unique policymaking capacity of the agency to balance the competing interests affected by various policy determinations. *Pauley*, 501 U.S. at 696.

In addition to the deference courts must provide to agency interpretations of statutes, courts must also accord "substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). A court is not entitled to "decide which among several competing interpretations best serves the regulatory purpose" or to substitute its judgment for that of the agency's, but must give an agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id*. (internal quotations omitted).

[3] Because this standard of agency deference originated in the Supreme Court case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is referred to as "Chevron deference."

B. Skidmore Deference

Even where agency action is not entitled to *Chevron* deference, because the statute is clear on its face and no agency elucidation is necessary, an agency's interpretation may merit a lesser, persuasive deference, referred to as "Skidmore deference." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Such deference is accorded to agencies because agencies possess specialized experience, can conduct broader investigations, and have more information at their disposal than traditional judicial tribunals. *Mead*, 533 U.S. at 234. Additionally, adhering to agency views achieves a desirable "uniformity in administrative and judicial understanding." *Id*. Skidmore deference towards an agency's action depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id*. at 228. Agency interpretations, including those in opinion letters, policy statements, agency manuals, and enforcement guidelines, "all of which lack the force of law — do not warrant [the] Chevron-style deference" applicable to agency interpretations in regulations but "are 'entitled to respect' under . . . *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (1999).

C. The Preamble Deserves Deference

Here, deference should be given to the preamble over the D.C. Circuit case law. First, under the *Chevron* framework, Congress has delegated the responsibility of administering the Longshore Act and its extensions to the Department, and its head, the Secretary of Labor. 33 U.S.C. § 939(a). Congress authorized the Secretary to prescribe "rules and regulations" to "administer the provisions of" the Longshore Act. *Id*. The Secretary subsequently established the OWCP, headed by the Director, and delegated to it "all functions of the Department of Labor with respect to the administration of benefits programs." 20 C.F.R. §§ 701.201-701.203. The Secretary also designated the Director to represent her in all review proceedings. 20 C.F.R. § 802.410(b). Furthermore, the Director is responsible for administering the D.C. Act, a direct extension of the Longshore Act. Therefore, the Department and the Secretary, through the Director, possess the responsibility to administer the D.C. Act under express Congressional mandate.

The Longshore Act, the 1984 Amendments to the Longshore Act, and the D.C. Act are all silent with regards to whether subsequently enacted amendments affect previously repealed extensions of the primary Longshore Act statute. Therefore, in accord with the second element of the *Chevron* framework, there is ambiguity regarding the application of the Longshore Act that is open to clarification through the Department's interpretation. *Pauley*, 501 U.S. at 596. Given the satisfaction of two of the *Chevron* elements, the only legal question that remains regarding the application of *Chevron* deference is whether the Department's views in a preamble to a final rule constitute agency action worthy of deference. *Mead*, 533 U.S. at 230.

Although the Supreme Court and the D.C. Circuit have remained silent as to the weight to accord a preamble to a final rule, at least one court has deferred to an agency's views within a preamble. In a case arising from the D.C. Circuit, a district court reasoned that "[t]he preamble, which gives official interpretative guidance to the regulation, should be accorded due deference

unless clearly erroneous or contrary to the terms of the regulation." *Henderson v. Stanton*, 76 F. Supp. 2d 10, 15-16 (D.D.C. 1999). The court noted that the need to define the statutory term at issue was "obviated by the fact that the definition appeared in the preamble to a final rule that had already been submitted for notice and comment." *Id*. at 16 n. 3. However, the Fifth Circuit has contrarily reasoned that language in the preamble "constitutes at best a comment on the regulations, and is not itself a regulation." *Langbecker v. Electronic Data Systems Corp*., 476 F.3d 299, 311 n. 22 (5th Cir. 2007). Although the Fifth Circuit conceded that a preamble was subject to the "notice and comment" rulemaking process and published in the Federal Register alongside the final rule, it maintained that the preamble was not subject to *Chevron* deference because it was not ultimately published in the Code of Federal Regulations. The Fifth Circuit concluded that the preamble is an "interpretation" of the regulation, and because the statute at issue was not ambiguous, the preamble was not entitled to *Chevron* deference. *Id*.; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 484 (2001) (noting that the *Chevron* deference applies to final rules, to the extent they involve the reasonable resolution of ambiguities in the statute).

I agree with the reasoning by the D.C. district court in *Henderson.* The preamble was formulated through a rigorous and formal notice and comment rulemaking procedure and thus was the product of the Department's extensive deliberation. As discussed above, agency action need not have been reached through a formal rulemaking process to be deserving of Chevron deference. *Mead*, 533 U.S. at 231 ("[W]e have sometimes found reasons for Chevron deference even when no such administrative formality was required and none afforded."). Although the language of the preamble was not incorporated into the final rule or the regulations, I ultimately find that the preamble should be treated with the force of law under the *Chevron* doctrine. The preamble resulted from the notice and comment rulemaking process and was contemporaneously generated with the final rule, and thus is most indicative of the Department's intent behind its regulations. Furthermore, the reasoning in the preamble is not arbitrary, capricious, or contrary to the Longshore Act, its amendments, or the D.C. Act extension. *Mead*, 533 U.S. at 226-27. Rather, the extended discussion in the preamble regarding D.C. Circuit case law and the intent of Congress and the D.C. legislature, suggests that the Department exercised careful judgment in considering, dissecting, and analyzing the ramifications of the various statutes. The preamble is not merely an isolated advisory guideline issued by the Department, but it is inherently associated with valid regulations that are within the contemplation of *Chevron*'s boundaries. *See* 20 C.F.R. § 701.101. Although the preamble itself is not a formal regulation, it possesses many similar qualities because it was subjected to a formal rulemaking process. *Cf. Coke*, No. 06-593 (Sup. Ct. June 11, 2007) (determining that the Department's regulation, although labeled as an "interpretation" and in conflict with another regulation, was valid and binding). Given all of these attributes in the preamble, I find that the agency's interpretation of the relationship between the 1984 Amendments and the D.C. Act in the preamble merits Chevron deference.

Notwithstanding the fact that the preamble deserves of Chevron deference, I alternatively note that the preamble would likewise deserve "persuasive" deference under the *Skidmore* doctrine. *See Skidmore*, 323 U.S. at 140 (asserting that although not binding, an agency's opinion letters, policy statements, and enforcement guidelines are entitled to "respect"). In the preamble, the Department undertakes a comprehensive evaluation of the flawed reasoning in the D.C. Circuit case law, the interrelationships between the applicable statutes and the 1984

Amendments, and the Congressional intent of the drafters. Thus, under *Skidmore*, there is "thoroughness evident" in the preamble. *Mead*, 533 U.S. at 228. Furthermore, the preamble's extensively reasoned discussion appears to be valid. Although the Director has taken the litigation position that the Amendments do not apply to the D.C. Act on at least one other occasion (in *Robidoux*, 2005-DCW-00001), the Department has made no other official pronouncements addressing the issue. *Id*. Accordingly, I find that the preamble warrants judicial deference, be it through *Chevron* or *Skidmore*.

D. Deference to the Director's Interpretation of Regulations

The discussion of administrative law above pertains to the deference that a judicial tribunal must extend to an executive agency, and thus is not directly applicable in our situation, as the Office of Administrative Law Judges is a component part of the Department. However, the case law illuminates the authority that a court must follow: the language in the preamble to the final rule or the language in the D.C. Circuit case law. Here, in addition to the conflict between the preamble and D.C. Circuit law, the Department has also issued two competing viewpoints on the applicability of the 1984 Amendments to the D.C. Act: the preamble and the Director's current position in the litigation before me. Thus, not only must we examine whether D.C. case law or the preamble is authoritative, but we must also undertake a discussion on whether to follow the preamble or the Director's current litigation position.

Although the Director possesses policymaking authority and is responsible for administering the Longshore Act, courts vacillate in their deference towards the Director's positions involving interpretation or application of the Longshore Act. The majority of courts recognize that the Director is designated as the policymaker of the Longshore Act and therefore, is entitled to deference. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 58 (2d Cir. 2001) (granting deference to the Director's interpretation of the Longshore Act); *Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 619 (3d Cir. 2006) (giving judicial deference to the Director as policymaker); *Clinchfield Coal Co. v. Harris*, 149 F.3d 307, 311 (4th Cir. 1998) (explaining that great deference is owed to the Director when interpreting statutory provisions over which he has authority); *Avondale Industries, Inc. v. Alario*, 355 F.3d 848, 851 (5th Cir. 2003) (affording *Skidmore* deference to the Director's interpretations of the Longshore Act); *Jones v. Dir., OWCP*, 977 F.2d 1106, 1110 (7th Cir. 1992) (deferring to the Director's construction of the Longshore Act "and articulations of administrative policy"); *Stevedoring Services of America v. Dir., OWCP*, 297 F.3d 797, 801 (9th Cir. 2002) (indicating that *Chevron* deference is owed to statutory interpretations by the Director); *Lollar v. Alabama By-Products Corp*., 893 F.2d 1258, 1262 (11th Cir. 1990) (reasoning that special deference is owed only to the Director and not to the Benefits Review Board). However, there is one Circuit that does not extend special deference to the Director. *Director, OWCP v. Detroit Harbor Terminals, Inc*., 850 F.2d 283, 287-88 (6th Cir. 1988) (concluding that the Director is not entitled to "great deference" and is not entitled to greater deference than the Board). Although the D.C. Circuit has not addressed this issue, I find that deference to the Director is warranted because the Director is responsible for implementing and enforcing the Longshore Act.

E. Courts Need Not Defer to an Agency's Unsupported Litigation Position

Courts need not extend *Chevron* deference to agency positions that are espoused adversarially for the first time in the course of litigation and "wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988). In *Bowen*, the Supreme Court declined to defer "to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question" because Congress delegated the responsibility for elaborating and enforcing statutes to agencies and not to counsel. *Bowen*, 488 U.S. at 212; *see also Investment Co. Institute v. Camp*, 401 U.S. 617, 627-28 (1971) ("It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress."). However, the Supreme Court has not yet addressed whether the Director should be accorded deference for a position raised for the first time in litigation. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1991) ("If the Director asked us to defer to his new statutory interpretation, this case might present a difficult question regarding whether and under what circumstances deference is due to an interpretation formulated during litigation.").

If an agency advances a position for the first time through litigation before a reviewing court, and thus propounds a *post hoc* rationalization for agency action though its litigation position, such position is not deserving of deference. *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 155-57 (1991). However, agency positions before administrative adjudications are a part of agency action, and thus distinguishable. *Id.*; *see also Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1261-62 (9th Cir. 2001) (deferring to the Director's reasonable statutory interpretations articulated in litigation positions asserted by the Director in administrative adjudications because such adjudications constitute agency action and not *post hoc* rationalization for agency action). In the Second Circuit, courts defer to the Director's "reasonable interpretations" of the Longshore Act. *Director, OWCP v. General Dynamics Corp*. 982 F.2d 790, 795 (2d Cir. 1992) (overruling its previous approach where no deference was accorded to the Director if he raised the issue in an adversarial position that was not objectively articulated in regulations). However, a position newly announced by the Director in litigation weighs against a finding of reasonableness. *Id.*; s*ee also Pool Co. v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001) ("When the Director advances interpretations of the [Longshore Act] in litigation briefs, such interpretations merit not *Chevron* deference, but *Skidmore* deference."); *but see Williams Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) ("Common sense tells us that if deference were always to be given to the Director's litigating position, then claimants would be effectively denied the right to appellate review.").

Even though adjudications before this court occur within the agency, and thus constitute agency action, I maintain adherence to the language of the preamble, rather than the Director's litigation position. Although not directly on point, the case law provides guidance in determining whether to follow the preamble's language or the Director's current stance in this litigation. The official position of the Department on this issue is unclear because the preamble and the Director's current position clearly conflict. Therefore, I will examine the case law and the language in the preamble and the Director's motion to determine which is deserving of deference.

Here, the preamble included extensive commentary by the Department on the regulations it issued regarding the D.C. Act. Furthermore, the preamble resulted from thoughtful consideration and a formal notice and comment rulemaking process undertaken by the Department. In contrast, the Director bases his motion on what he refers to as "controlling" D.C. Circuit case law. In the Director's motion, he maintains that D.C. Circuit law binds this tribunal and that "neither the general savings statute nor DOL's regulation changes that outcome." (Director's Reply to Defs.' Opp'n to Mot. for Reconsideration, p. 5) (capitalization omitted). However, as discussed above, under principles of administrative law, courts must defer to the Department's interpretation of the Longshore Act over the differing interpretation in D.C. Circuit case law. Furthermore, the Director's current litigation position does not appear to be the product of agency deliberation and judgment, nor was it developed while acting in a neutral policymaking capacity in the course of formal or informal agency proceedings. It is not apparent from the Director's motion that the Department has adopted an official change in policy from its previous position in the preamble. Rather, the Director adopts this position as a litigating party. Although the Director is the designated policymaker for the Longshore Act and is to be accorded deference, the language in the preamble is clear and formulated in a manner warranting respect. Accordingly, because the preamble's language and comprehensive reasoning is firm and the Director's motion relies upon suspect case law, I DENY the Director's Motion for Reconsideration.

Given that I deny the Director's motion, and thus uphold the terms of the settlement, I need not address the Respondents' unmeritorious arguments regarding waiver and estoppel against the Director. I note in passing that the issue here cannot be waived and the Director made no misstatement of or gave no erroneous advice regarding the law. *U.S. v. Cotton*, 535 U. S. 625, 630 (2002) (reasoning that subject-matter jurisdiction can never be waived because it involves a court's power to hear a case); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990) ("[E]quitable estoppel will not lie against the Government as it lies against private litigants;" however, the government might be bound by mistaken representations of an agent, if the representations were clearly within the scope of the agent's authority and there was "affirmative misconduct" by the government employee).

ORDER

The District Director's Motion for Reconsideration is DENIED.

A

JENNIFER GEE
Administrative Law Judge